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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 446

C. K. BENSON and W. HAVARD PERKINS, Doing Business as PERKINS AND COMPANY, a Partnership,

Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT.

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C. K. BENSON and W. HAVARD PERKINS, Doing Business as PERKINS AND COMPANY, a Partnership,

Petitioners,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals For the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of C. K. Benson and W. Havard Perkins, Doing Business as Perkins and Company, a Partnership, respectfully sets forth the following:

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause involves the authority or power of the Administrator of the Wage and Hour Division of the United States Department of Labor, under the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act, Sections 209 and 211 (a) of Title 28, U. S. C. A., to conduct

an investigation into the books, records and papers of an employer, and to issue a subpoena duces tecum to require the production of such books, records and papers, and to compel compliance on the part of such employer with the subpoena duces tecum, without alleging any facts in his application for the enforcement order, or making a showing in support thereof, to establish that the employer sought to be investigated and required to produce his books, records and papers is within and subject to the terms of the Fair Labor Standards Act, and whether, in the enforcement proceedings, the employer is entitled to a hearing and determination of the issue of whether he is within and subject to the provisions of the Fair Labor Standards Act, and the Administrator is, therefore, exercising the authority conferred upon him under said Act, or whether, in the enforcement proceedings, as held by the Court of Appeals, the Administrator is required to show only that he has "reasonable ground to believe" the employer "sought to be investigated is subject to the Act" (Court of Appeals' opinion, R. p. 17), and that the employer, in such enforcement proceedings, is not entitled to a hearing and determination by the Court on the issue of whether he is within and subject to the provisions of the Fair Labor Standards Act, before his rights of privacy and against unreasonable searches and seizures under the Fourth Amendment to the Constitution of the United States are invaded and violated. On June 17, 1942, there was served on the petitioners a subpoena duces tecum (R. pp. 5-6), signed by the Administrator of the Wage and Hour Division, requiring the petitioners to appear before designated individuals at the Wage and Hour Division office in St. Louis on June 30, 1942, to testify and produce certain described papers "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, regarding complaints of violations by the said Perkins and Company, a partner-

ship, of Sections 7 (a) (1), (2) and (3) of said Act" (R. p. 5).

The petitioners did not comply with the subpoena. Whereupon the Administrator applied (R. pp. 1-5) to the District Court for enforcement of the subpoena. The Administrator's application to the District Court for an order to compel compliance on the part of petitioners with the subpoena duces tecum issued by the Administrator "did not allege, nor set forth any facts indicating, that appellees (petitioners) or any of their employees were engaged in interstate commerce or in the production of goods for interstate commerce, nor did it contain any allegation that the Administrator had reasonable ground to believe that this was the fact, and, on the hearing on appellees' (petitioners') motion to dismiss, the Administrator apparently did not offer to make any showing of any nature" (Court of Appeals' opinion, R. p. 15).

The said application of the Administrator alleged specifically that the petitioners were "engaged in the practice of public accounting at 711 St. Charles street, St. Louis, Missouri" (R. p. 2), and further alleged that "All of the books, papers and documents required to be produced by said subpoena duces tecum were, at the time of the issuance of said subpoena, and are now, relevant, material, necessary and appropriate to determine whether respondents have violated Sections 7 (a) (1), (2) and (3) of the Act, and will aid in the enforcement of the provisions of the Act" (R. p. 4).

On August 24, 1942, petitioners filed a motion to dismiss the application of the Administrator "for lack of jurisdiction apparent on the face of said application" (R. pp. 8-9) for the following reasons:

(1) Because the application did not contain any allegations of fact showing (a) that the Administrator had jurisdiction to issue the subpoena duces tecum; (b) that the

District Court had jurisdiction to enforce the subpoena; (c) that petitioners are within and subject to the terms of the Fair Labor Standards Act, and (d) that petitioners, or any of their employees, are engaged in interstate commerce or in the production of goods for interstate commerce.

(2) Because Section 11 (a) of the Fair Labor Standards Act expressly limits the authority of the Administrator to the investigation of those "subject to" the Act, and the application of the Administrator contains no allegation that petitioners are subject to the Act.

(3) Because the application shows on its face that the Administrator seeks to violate the rights of the petitioners secured to them by the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures (R. pp. 8-9).

On October 29, 1942, after hearing, the District Court sustained the motion to dismiss and dismissed the application of the Administrator to compel compliance (R. pp. 9-10). The Administrator did not ask leave to amend.

Thereafter, on January 26, 1943, the Administrator filed notice of appeal to the Circuit Court of Appeals for the Eighth Circuit (R. p. 10) from the order of dismissal (R. pp. 9-10), and the appeal was duly allowed. On August 13, 1943, the Circuit Court of Appeals handed down its decision (R. pp. 14-23) reversing and remanding the cause with direction that "The Administrator should be given leave to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that appellees' (petitioners') business is subject to the Act" (R. p. 23), and holding that if the Administrator satisfies the District Court that he has "reasonable ground to believe" that petitioners are subject to the Act, that the District Court must grant the enforcement order, and that

petitioners are not entitled to a hearing on the issue of whether they are within and subject to the Fair Labor Standards Act, before their rights of privacy and against unreasonable searches and seizures are invaded and violated (R. p. 17).

The petitioners then filed a petition for rehearing (R. pp. 25-54), which motion was denied on September 9, 1943 (R. p. 55).

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 26 Stat. 828, as amended, 28 U. S. C. A., Section 347 (a).

2. The date of the judgment of the Circuit Court of Appeals of the Eighth Circuit herein sought to be reviewed is August 13, 1943, and petition for rehearing was denied September 9, 1943.

QUESTIONS PRESENTED.

1. Did not the Circuit Court of Appeals for the Eighth Circuit err in holding that, in a proceeding pursuant to Section 9 of the Fair Labor Standards Act to compel compliance to a subpoena duces tecum, the employer is not entitled to a trial and adjudication of the question of coverage under the Act?

2. Did not the Circuit Court of Appeals for the Eighth Circuit err in holding that, "in the collaboration of judicial power and function with administrative process * * * courts must conscientiously guard against any instinct of over-protectiveness," of the constitutional rights of citizens, where such "over-protectiveness" will interfere with "proper administrative effort or result," and holding further in this connection that it would not be an unreasonable search and seizure for the Administrator, merely upon

reasonable ground to believe that an employer apparently was subject to the Act, to compel the production of the books, records and papers of such employer in order to enable the Administrator to determine whether such employer was subject to the Act, even though the employer be not actually subject to the Act, and had been denied a hearing on the question of coverage?

3. Did not the Circuit Court of Appeals for the Eighth Circuit err in refusing to hold that this case was controlled by rules of decision enunciated by the Court of Appeals for the Sixth Circuit in General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596, and, by reason thereof, is in conflict with said decision of the Sixth Circuit Court of Appeals?

4. Did not the Circuit Court of Appeals for the Eighth Circuit err in interpreting the holding of this Court in Endicott Johnson Co. v. Perkins, 317 U. S. 501, as "clearly pointing the way" to the conclusion that an employer is not "entitled to a trial and adjudication of the question of coverage under the Fair Labor Standards Act?"

5. Did not the Circuit Court of Appeals for the Eighth Circuit err in reversing and remanding the cause with direction that "the Administrator should be given leave to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that" petitioners' business is subject to the Fair Labor Standards Act, where there was no error on the part of the District Court on the pleadings presented to the District Court, and where the Administrator did not at any time seek or ask leave of the District Court, or the Court of Appeals, to amend his application?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Eighth Circuit held that an employer was not entitled to a trial and adjudication of the question of coverage in a proceeding by the Administrator of the Wage and Hour Division, under the Fair Labor Standards Act, to compel compliance to a subpoena duces tecum. Sections 9 and 11 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, Secs. 9 and 11, 52 Stat. 1065, 1066, 29 U. S. C. A., Secs. 210, 211) provide that the Administrator can only require the production of the books, papers and documents of an employer when that employer is subject to the Act. The method of enforcing compliance to a subpoena duces tecum is established by Section 9 of the Federal Trade Commission Act (Sept. 26, 1914, c. 311, Sec. 9, 38 Stat. 722, 15 U. S. C. A., Sec. 49), which is incorporated into the Fair Labor Standards Act. Prior to the enactment of the Fair Labor Standards Act, Section 9 of the Federal Trade Commission Act had been judicially interpreted to allow a hearing of all defenses, including a lack of coverage, in the enforcement proceedings. Federal Trade Commission v. Smith, 34 F. (2d) 323; Federal Trade Commission v. Claire Furnace Co. et al., 274 U. S. 160, and it has been held that such hearings are also required in proceedings under the Fair Labor Standards Act. General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596; Application of Walling (News Printing Co.), 49 F. Supp. 659. The question of law involved is of wide importance in the administration of the Fair Labor Standards Act, and, by reason of the decision of the Eighth Circuit Court of Appeals in this case, is now in confusion and should be clarified.

2. The Circuit Court of Appeals for the Eighth Circuit held that it would not be an unreasonable search and

seizure to compel the production of documents of one not subject to the Fair Labor Standards Act. The decisions in General Tobacco & Grocery Co. v. Fleming, 125 F. (2d) 596; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298; Jones v. Securities & Exchange Commission, 298 U. S. 1, and other representative decisions cited in our supporting briefs hold that such a compulsory production of documents would be an unconstitutional and unreasonable search and seizure. The decision of the Circuit Court of Appeals in this case conflicts with the great weight of authority on this question of general law.

3. This case presents questions of prime importance as to the authority of the Administrator under the Fair Labor Standards Act. A decision of this Court on the issues involved is believed to be of extreme importance, not only for the future guidance of the Administrator in the performance of his duties under the Act, but also to the petitioners and the employing public in general.

The United States Circuit Court of Appeals for the Sixth Circuit held, in the case of General Grocery and Tobacco Company v. Fleming, 125 Fed. (2d) 596, that:

> "It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

The Court of Appeals for this Eighth Circuit in the case at bar held that:

> "Thus, while it is our view that the employer is not entitled to a trial and adjudication of the question of coverage on the Administrator's application to enforce

an investigatory subpoena, and that the Administrator is not required to make proof of actual coverage as a basis for judicial aid in its enforcement, we believe that the district court is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but that reasonable ground exists for making the investigation" (R. pp. 17-18).

And further:

"For investigatory purposes under the Act, it would amount simply to a justifiable basis for believing that a certain state of facts probably exists, derived from reasonable inquiry or other credible information. As applied to the immediate situation, it would be such facts or information as reasonably would lead the Administrator to believe that appellees' business, in some phase, was apparently and probably subject to the Act" (R. p. 21).

There is a clear conflict between the holding of the Circuit Court of Appeals for the Sixth Circuit, in the General Tobacco and Grocery Company case, supra, and the holding of the Court of Appeals in the case at bar, which is admitted by the Eighth Circuit in its opinion (Footnote 2, R. p. 17).

We feel that the public interests require that this conflict should be reviewed and settled by this Court in this case in order to secure uniformity of decisions.

Aside from the importance of settling the issue of the authority of the Administrator in the respects mentioned under the Fair Labor Standards Act, and the conflict between the decision of the Eighth Circuit in this case and the decision of the Sixth Circuit in the case of General Tobacco and Grocery Company, supra, we believe that the decision of the Court of Appeals in the case at bar is susceptible of the interpretation that the Court has enunciated in its opinion the dangerous, untenable doctrine

that the courts should not be overzealous in safeguarding the constitutional right of citizens if to do so will interfere with the effective enforcement of a federal law. Such a holding is clearly erroneous and not in accord with the principles enunciated by this Court in certain applicable decisions, as pointed out in our supporting brief.

4. The decision of the Circuit Court of Appeals for the Eighth Circuit largely resulted from a misconstruction and misapplication of the decision of this Court in Endicott Johnson Corp. v. Perkins, 317 U. S. 501, in that it interpreted the holding of this Court, which was based upon a different statutory provision, the Walsh-Healey Act, and in which coverage was voluntarily accepted by contract, as "clearly pointing the way" to the conclusion that an employer is not "entitled to a trial and adjudication of the question of coverage" under the Fair Labor Standards Act. It is important that this Court should clarify the application, if any, of its decision in the Endicott Johnson Corp. case.

5. The decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case, as above pointed out, and also in reversing and remanding the cause to allow the Administrator to amend his application, "if he can and wishes to do so," is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its powers of supervision.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment and decree of the Court of Appeals for the Eighth

Circuit be reversed by this Honorable Court, and the judgment and decree as entered by the District Court in this case be in all respects affirmed, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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